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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

NO. 343

CLARENCE J. THOMPSON,
Petitioner,

v.

THE STATE OF GEORGIA,
Respondent.

BRIEF OF THE STATE OF GEORGIA, RESPONDENT, IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI TO COURT OF APPEALS OF GEORGIA.

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PART ONE

STATEMENT OF CASE

Clarence J. Thompson was charged in separate counts of an indictment in the Superior Court of Fulton County, Georgia, with three separate offenses of misdemeanor. It was alleged that the City of Atlanta sold water to customers who paid therefor on the basis of the cubic feet supplied as measured and recorded by a meter installed by the City, and that Thompson, an inspector employed by the City in its water works department, pursuant to a corrupt agreement and conspiracy between him and named water custom-

ers, altered the meters installed on said customers' premises so that they failed to register and record a substantial part of the water flowing through them and used by the customers, causing the City to render said customers bills for less water than was supplied and used by the customers, who paid Thompson for accomplishing that result; all of which acts defrauded the City of stated amounts of water of stated values.

Thompson's demurrer challenging each count of the indictment as charging no crime was overruled by the Superior Court, and upon his subsequent conviction on each count and denial of new trial he excepted to all adverse rulings by bill of exceptions to the Court of Appeals of Georgia. The Court of Appeals held the demurrer should have been sustained and the indictment quashed as charging no crime, but subsequently during the term and before remittitur or mandate to the Superior Court, the Court of Appeals, upon motion for rehearing filed by the State (R. 22-27), held that the State might move for rehearing and the court reconsider the case, and refusing to dismiss the motion for rehearing, withdrew its first opinion and the consequent judgment of reversal, reconsidered the case, and held the indictment did charge a crime under the laws of Georgia and that the demurrer was rightly overruled and Thompson's conviction without error. *Thompson v. State*, 19 S. E. (2nd) 777; R. 32-41. The Supreme Court of Georgia denied certiorari and refused rehearing. R. 49, 60.

The instant petition to the Supreme Court of the United States for certiorari to the Court of Appeals of Georgia challenges the constitutionality of the action of the Court of Appeals in withdrawing its opinion and judgment favorable to Thompson and thereafter substituting an opinion and judgment unfavorable to him. It is contended by applicant that the reconsideration of the case by the Court of Appeals resulting in that court's correction of its error in first holding the indictment charged no crime, violated (1)

the provision of the Constitution of Georgia against double jeopardy (2) the due process clause of the Constitution of Georgia (3) the Fifth Amendment to the Constitution of the United States, and (4) the Fourteenth Amendment to the Constitution of the United States. (His petition, Part II, pars. 2, 3, 4, p. 9.)

SUMMARY

In the Court of Appeals petitioner did not urge the State or Federal Constitutions. He had opportunity to do so in his motion to dismiss the State's motion for rehearing (R. 27-30) and did urge a claim that the State could not move for rehearing because not a "party" to a criminal case. In his petition to the Supreme Court of Georgia for certiorari to the Court of Appeals a claim of infringement of the State Constitution was made, but error is not now assigned on the judgment of the Supreme Court. In these circumstances petitioner's assertion of denial of constitutional right comes too late.

The assignments of error based on the Constitution of Georgia do not present any Federal question, the enforcement of the Constitution of Georgia being a matter for the courts of the State.

The assignments of error based on the Fifth Amendment are without merit as that Amendment is directed to the Federal government and not the States.

No violation of the Fourteenth Amendment is shown. In permitting the State to file motion for rehearing and in thereafter reconsidering the case and correcting its erroneous opinion and judgment while the case was within its jurisdiction, the Court of Appeals did not deprive petitioner of due process of law, but simply availed itself of familiar and usual procedure to the end that its judgments might be correct. Petitioner invoked the judgment of the Court of Appeals to decide his case and the procedure of rehearing was incident to that decision. There is no sub-

stance to the claim of petitioner that the action of the Court of Appeals put him in jeopardy twice for the same offense; but if what was done were taken to have that effect no denial of due process would appear. *Palko v. Connecticut*, 302 U. S. 319, 82 L. ed. 288, rules this case as to that contention.

PART TWO

ARGUMENT

NO FEDERAL QUESTION IS PRESENTED BY THE CLAIM THE STATE CONSTITUTION WAS VIOLATED.

The courts of the State have full power and authority to construe the Constitution and laws of the State, and their construction is final, conclusive and binding upon the Supreme Court of the United States. A writ of certiorari will not issue out of the Supreme Court of the United States to a State court to review a decision based on State law, for the Supreme Court of the United States has no jurisdiction to review decisions based on State law. *McBride v. Hoyne*, 11 Peters (36 U. S.) 167, 9 L. ed. 673; *Congdon v. Goodman*, 2 Black (67 U. S.) 574, 11 L. ed. 257; *Palmer v. Marston*, 14 Wall. (81 U. S.) 10, 20 L. ed. 826; *Sevier v. Haskell*, 14 Wall. (81 U. S.) 12, 20 L. ed. 827; *de Saussure v. Gaillard*, 127 U. S. 216, 32 L. ed. 125; *Quimby v. Boyd*, 128 U. S. 488, 32 L. ed. 502; *Avery v. Popper*, 172 U. S. 305, 45 L. ed. 203; *Smalley v. Laugenour*, 196 U. S. 93, 49 L. ed. 400; *Allen v. Allegheny Co.*, 196 U. S. 458, 49 L. ed. 551; *Elder v. Badgley*, 204 U. S. 85, 51 L. ed. 381; *Sylvester v. Washington*, 215 U. S. 80, 54 L. ed. 101; *Lem Woon v. Oregon*, 229 U. S. 586, 57 L. ed. 1340; *John v. Paullin*, 231 U. S. 583, 58 L. ed. 381.

The Court of Appeals did not in terms pass upon any constitutional question (headnote 1 of opinion, R. 32, body of opinion, R. 35), petitioner not invoking any provision of the State or Federal Constitutions in that court (see motion to dismiss State's motion for rehearing, R. 27-31), and under such circumstances petitioner may not now assert a

claimed violation of the State Constitution (*New York ex rel. Rosevale Realty Co. v. Kleinert,* 268 U. S. 646 (1), 650, 651, 69 L. ed. 1135, 1137). Petitioner contends, however, that the "decision of the Court of Appeals of the State of Georgia *necessarily involved* a construction . . . of the Constitution of Georgia and was contrary thereto" (his petition, p. 10). We doubt the soundness of this contention (Cf. *Harding v. Illinois,* 196 U. S. 78, 88, 49 L. ed. 394, 397); but taking this contention as correct, it shows no jurisdiction in the Supreme Court of the United States, for this court is without authority to enforce State Constitutions. " . . . the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; . . . This court's power to review decisions of State courts is limited to their decisions on Federal questions; . . . the mere fact that a State court has rendered an erroneous decision on a question of State law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not . . . confer appellate jurisdiction on this court." *Brunkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U. S. 673, 679, 680, 74 L. ed. 1107, 1113.

Each State has the right to construe its own statutes and constitutional provisions. "The unconstitutionality of a statute may depend upon its conflict with the Constitution of the State or with that of the United States. If conflict with the State Constitution is the sole ground of attack, the supreme court of the State is the final authority . . ." *Michigan Central Railroad v. Powers,* 201 U. S. 245, 290, 291, 50 L. ed. 744, 760. "It is sufficient to say in reference to this contention that the decision of the supreme court of the State . . . sustaining the statute is conclusive in this court, as to any question of conflict between it and the State Constitution. *West River Bridge Co. v. Dix,* 47 U. S. (6 How.) 507; *Bucher v. Cheshire R. Co.,* 125 U. S. 555; *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S. 232; *Lewis v. Monson,* 151 U. S. 545; *Adams Express Co. v. Ohio State Auditor,* 165 U. S. 194; *Long Island Water Supply Co. v.*

Brooklyn, 166 U. S. 686." *Merchants & Manufacturers National Bank v. Commonwealth,* 167 U. S. 461, 462, 463, 42 L. ed. 236, 237. "But the conformity with the State Constitution of the proceedings . . . is a question for the determination of the State court, and its judgment is final." *Smith v. Jennings,* 206 U. S. 276, 278, 51 L. ed. 1061, 1063. "It is argued that the Court of Appeals exceeded its functions under the Constitution of the State, and in that way denied the plaintiff due process of law. We see no reason to think so, but with that question we have nothing to do." *Burt v. Smith,* 203 U. S. 129, 135, 51 L. ed. 121, 127. "It is argued that the State court misconstrued the statute, but we have nothing to do with that." *King v. West Virginia,* 216 U. S. 92, 101, 54 L. ed. 396, 401. See, *French v. Taylor,* 199 U. S. 274, 50 L. ed. 189. "The State supreme court held that the trial court, in admitting the testimony, did not commit error. This, notwithstanding the Constitution of Missouri provided 'that no person shall be compelled to testify against himself in a criminal case.' Its ruling upon that proposition is not subject to review in this court." *Barrington v. Missouri,* 205 U. S. 483, 486, 51 L. ed. 890, 894. See, *Leeper v. Texas,* 139 U. S. 462, 35 L. ed. 225, 227. That the action of the trial court in admitting the evidence was not contrary to the Constitution of the State "is for this court foreclosed by the decision of the highest court of the State." *Brown v. New Jersey,* 176 U. S. 172, 174, 44 L. ed. 119, 120.

THE STATE CONSTITUTION WAS NOT VIOLATED.

The Constitution of Georgia provides "No person shall be deprived of life, liberty, or property, except by due process of law" (*Code of Georgia of* 1933, *Sec.* 2-103); and "No person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his, or her own motion for a new trial after conviction, or in case of mistrial (*Code of Georgia of* 1933, *Sec.* 2-108). The action of the Court of Appeals in granting a rehearing at the instance of the State and thereafter reconsidering the case and hold-

ing the indictment good as charging a crime and petitioner's trial free from error, was in no way contrary to these constitutional provisions.

Due process of law was not denied petitioner by the action of the Court of Appeals. It is familiar practice in appellate courts to consider motions for rehearing and correct any errors pointed out thereby. The desire of the Court of Appeals to render a *correct decision* even though it necessitated a reversal of its first opinion is certainly not a *denial* of due process. Rather, it would seem to be the surest *guarantee* of due process of law. Rehearings during the term and before the remittitur has been transmitted to the court below are provided for by the rules of the court upon motion of the losing party. *Code of Georgia of* 1933, *Sec.* 24-3643.

The provision against double jeopardy was not violated by the action of the Court of Appeals. What the Court of Appeals did in this case, that is, simply review and correct its own opinion and judgment during the term and before its remittitur had been transmitted to the court below, is not even remotely related to the evil of putting the citizen "in jeopardy of life or liberty more than once for the same offense save on his, or her own motion for new trial after conviction," as forbidden by the Constitution of Georgia. The evil which the Constitution forbids is that of putting the citizen on trial before a jury which acquits him and thereafter putting him on trial for the same offense before another jury which may convict him notwithstanding the prior acquittal. It does not in any way deal with the practice which an appellate court may adopt in order to determine a writ of error brought to that court by an accused who complains of errors of law resulting in his conviction in some court of original jurisdiction.

Petitioner was not in "jeopardy" in the Court of Appeals. His case was in that court on writ of error brought by him invoking the jurisdiction of that court to determine ques-

tions of law. "Jeopardy," in the constitutional sense, refers to an accused being put on trial before a jury which is authorized to convict him of crime. See, *Reynolds v. State*, 3 Ga. 53. "That jeopardy begins when the jury are empanelled and sworn is the rule recognized in Georgia. *Newsom v. State*, 2 Ga. 60; *Nolan v. State*, 55 Ga. 521." *Franklin v. State*, 85 Ga. 571. There was no jury in the Court of Appeals, nor was that court empowered to convict or acquit him of any offense. Petitioner was in "jeopardy" in the Superior Court when he there went on trial before the jury which convicted him, and that is the only time he has been in "jeopardy" in this case.

Petitioner's claim is that the first opinion and judgment of the Court of Appeals served to sustain his demurrer to the indictment and dismiss the indictment as charging no crime; and that he was thereby discharged and acquitted, and relieved of the punishment imposed upon him in the trial court; and when the Court of Appeals withdrew that opinion and judgment and substituted therefor an opinion and judgment that the indictment did charge a crime, the court thereby placed him in a situation in which he must suffer the punishment imposed upon him in the trial court, contrary to the result of the former opinion and judgment; and that this in effect was double jeopardy, because having obtained a favorable opinion amounting to an acquittal he was entitled to have that acquittal stand.

Assuming this contention to correctly state the facts, it presents no case of double jeopardy within the meaning of the Constitution. For the Constitution does not relate to procedure in appellate courts and is irrelevant. The action of the Court of Appeals in the premises was but incident to and a part of the regular determination of the judgment of that court which petitioner invoked by his bill of exceptions.

But petitioner's claim rests upon an incorrect premise respecting the effect of the first opinion and judgment of

the Court of Appeals. That opinion and judgment did not acquit petitioner. The judgment was not a final judgment in his favor. It created no settled rights in him. In Georgia the Court of Appeals and Supreme Court do not operate directly upon litigants. Those courts merely affirm or reverse the judgments of trial courts, and before the rights of litigants are affected it is necessary that the trial court render judgment in the case upon the remittitur of the appellate court. In some cases the situation in the trial court has changed from that presented to the appellate court, as by the filing of an amendment, and the remittitur is not carried into effect, but the case reconsidered by the trial court in the light of the new pleadings. *Berrien County Bank v. Alexander,* 154 *Ga.* 775 (1), 777, 778, 779; *Savannah v. Chaney,* 102 Ga. 814 (1); *Jackson v. Security Insurance Co.,* 47 Ga. App. 626 (1). Judgments of the Court of Appeals and Supreme Court do "not terminate a case proprio vigore, but (such) judgments have to be carried into effect by the Circuit Court." *Sullivan v. Rome,* 28 Ga. 29, 30. Before petitioner could acquire any final rights from the opinion and judgment of the Court of Appeals it would have been necessary for the remittitur from that court to have been received in the Superior Court of Fulton County and made its judgment.

It is also the law in Georgia that "judgments of (the Court of Appeals and Supreme Court) are completely under (their) control during the term at which they are rendered, (and) until the remittitur has been transmitted to the court below." *Cooper v. Portner Brewing Company,* 113 *Ga.* 1. See, also, *Seaboard Air-Line Rwy. Co. v. Jones,* 119 Ga. 907. When petitioner by his bill of exceptions to the Court of Appeals invoked its judgment, he invoked it subject to this law. And when that court rendered its first judgment in his favor, it rendered it subject to this law, and subject to the right, power, authority and duty of the court to change that judgment during the term and before the

remittitur had been transmitted, if it by any means became convinced that such judgment was erroneous.

True, as petitioner says in his brief, in Georgia the State has no right of appeal in criminal cases, even in a case in which the indictment has been dismissed on demurrer as charging no crime and the accused never put in jeopardy before a jury. *State of Georgia v. Jones,* 7 Ga. 422. The right of appeal in such cases, however, is not denied upon constitutional grounds, but because of common law principles forbidding it unchanged by subsequent statute. See, *Georgia v. Jones* (supra) pp. 424, 425. That the State may not appeal in criminal cases affords no reason why the State may not move for rehearing in a criminal case in the Court of Appeals or Supreme Court in keeping with the rules of court applicable to motions for rehearing, and the court grant rehearing and render an opinion and judgment contrary to that first rendered; for such procedure relative to rehearing is in no sense an appeal by the State, but is merely a part of the process used by the appellate court whereby it avails itself of the service and suggestion of its bar to the end that its judgments may be in accordance with law. In reconsidering the case upon motion of counsel for the State the appellate court is not entertaining *any appeal by the State,* but is disposing of the *appeal by defendant* who brought the case to the appellate court and invoked its jurisdiction and the decision incident to which the rehearing is granted.

Petitioner says the action of the Court of Appeals in his case "is a solitaire"; and it is true the case seems to be the first in Georgia in which the Court of Appeals or Supreme Court granted rehearing of a criminal case at the instance of the State and thereafter rendered a contrary judgment. This is no evidence of illegality or unconstitutionality, nor is the procedure without physical precedent in Georgia. Motions for rehearings were filed by the State without challenge in the Court of Appeals in *B'Gos v. State,* 43 Ga. App.

379, and *Hurt v. State,* 62 Ga. App. 878; and in the Supreme Court in *Layton v. State,* 165 *Ga.* 265, 281. In Texas, the Constitution, in terms, denies the State the right of appeal in criminal cases (*State v. Daugherty,* 5 Texas 1; *McCue v. State,* 75 Tex. Cr. R. 137, 170 S. W. 280 (20); and motions by the State for rehearing in the appellate courts are frequently considered and determined (*Cole v. State,* 92 Tex. Cr. R. 360, 243 S. W. 1100 (10); *Fitts v. State,* 98 Tex. Cr. R. 146, 264 S. W. 1006 (45); *Cooper v. State,* 98 Tex. Cr. R. 446, 265 S. W. 894 (4)). Petitioner's disappointment is understandable, but he shows no illegality in the action of the Court of Appeals in correcting its error.

NO FEDERAL QUESTION WAS RAISED IN THE COURT OF APPEALS.

The right of the State to move for rehearing was challenged by petitioner in the Court of Appeals by his motion to dismiss the motion for rehearing. The motion to dismiss was upon the ground the State could not move for rehearing in a criminal case because it was not a "party" thereto, being only the accuser, petitioner contending the court could entertain motions for rehearing only when made by a "party" to the case. No claim was made that the Federal Constitution forbade the court to reconsider the case at the State's instance. R. 27-30. In Paragraph 23 of the petition to the Supreme Court of Georgia for writ of certiorari to the Court of Appeals it was contended the action of the Court of Appeals in the premises of the rehearing was contrary to the provision of the State Constitution against double jeopardy, but the Federal Constitution was not mentioned, nor is error assigned on the judgment of the Supreme Court. Petitioner having had opportunity to assert his claims under the Federal Constitution in his motion to dismiss the State's motion for rehearing and not having then done so, this court will not entertain the claim at this late date, under the settled rule that "where the record does not show that (petitioner's) objection was placed on

any Federal ground in the lower courts" the Supreme Court of the United States is without jurisdiction. *House v. Road Improvement District,* 266 U. S. 175 (3), 69 L. ed. 229, 230.

Petitioner seeks to avoid the consequences of this law by contending "that the violation of the provisions of the Federal Constitution could not have been invoked until the Court of Appeals of Georgia rendered this judgment of April 3, 1942 . . . and vacated a solemn judgment of acquittal, in favor of petitioner and (withdrew) . . . a previous opinion in the same case and (rendered) . . . another opinion in contradiction of the first . . ." (His petition, par. 9, p. 12.) This contention is untenable. Petitioner invoked and the Court of Appeals determined his claim that the State could not move for rehearing because it was not a "party" to the case. Why could he not at the same time have invoked his alleged rights under the Federal Constitution? It is clear he could have done so, and equally clear that his belated assertion in this court of claims under the Fifth and Fourteenth Amendments is an afterthought insufficient to confer jurisdiction.

Petitioner also makes the same contention respecting the Federal Constitution as he makes respecting the State Constitution, that is, that the action of the Court of Appeals in reconsidering and redeciding the case *"necessarily involved a construction"* of the Federal Constitution (his petition, par. 5, p. 10). It is difficult to see how this could be correct. The court in its opinion did not mention the Constitution. The record did not refer to the Constitution. Counsel did not suggest that any constitutional question was involved. That the case "necessarily involved" the Constitution was kept secret from all concerned until the filing of the instant petition for writ of certiorari.

THE FEDERAL CONSTITUTION WAS NOT VIOLATED.

(a) The Fifth Amendment.

Petitioner's claim that the Fifth Amendment was violated is without merit because that Amendment "is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to . . . the States." *Barron v. Baltimore,* 7 Peters 243, 8 L. ed. 672. To the same effect, see, *Twining v. New Jersey,* 211 U. S. 78, 93, 53 L. ed. 97, 103; *Spies v. Illinois,* 123 U. S. 131, 31 L. ed. 80; *Brown v. New Jersey,* 175 U. S. 172, 44 L. ed. 119; *Barrington v. Missouri,* 205 U. S. 483, 51 L. ed. 890. "The Fifth Amendment . . . is not directed to the States, but solely to the Federal government." *Palko v. Connecticut,* 302 U. S. 319, 322, 82 L. ed. 288, 290.

(b) The Fourteenth Amendment.

The contention that the Fourteenth Amendment was violated because the Court of Appeals did not follow the State Constitution proceeds upon the ". . . misconception . . . that the requirement of due process of law took up the special provisions of the State Constitution and laws into the Fourteenth Amendment for the purposes of the case, so that this court would review the decision of the State court to see that the local provision had been complied with. This is a mistake." *Rawlings v. Georgia,* 201 U. S. 638, 639, 50 L. ed. 899, 900.

Was it a denial of that due process of law guaranteed by the Fourteenth Amendment for the Court of Appeals to entertain the State's motion for rehearing and thereafter decide the case against petitioner upon reaching the conclusion that its first opinion in his favor was erroneous? This question is readily answered in the negative. Petitioner's case was in the Court of Appeals on writ of error brought by him, whereby he invoked the jurisdiction of that court for the determination of the questions he presented. In determining those questions the Court was at

liberty to adopt such procedure as in its opinion made for correct decision, and if before it lost jurisdiction (that is, during the term and before the remittitur was transmitted to the lower court) it concluded that a judgment theretofore pronounced by it in the case was error, it was within the power of the court to modify or change that judgment; and such action was not a denial, but was a guarantee of due process.

The State ". . . is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offend some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U. S. 97, 105. "The concept of due process is not technical. Form is disregarded if substantial rights are preserved. In whatsoever proceeding, whether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life." Per Roberts, J., in *Snyder v. Massachusetts* (supra), at p. 127. Petitioner's contention of denial of due process, in the light of these principles, seems strained.

It is averred by petitioner that he was denied due process because the action of the Court of Appeals amounted to an allowance of an appeal by the State in a criminal case. Sufficient refutation of this is found in the fact that the Federal government is prohibited by the Fifth Amendment from denying due process of law, yet the United States has right of appeal on questions of law in some criminal cases under the circumstances stated in the statute, U. S. C. A., Title 18, Sec. 682, which has been held constitutional in *Taylor v. United States*, 207 U. S. 120, 127, 52 L. ed. 130, 134. In that case the court said of the attack on the act of Congress: "The defendant argues that the United States cannot be allowed a writ of error in a criminal case like this.

We do not perceive the difficulty . . . We think it unnecessary to discuss the question at length." See, also, *United States v. Bitty,* 208 U. S. 393, 399, 52 L. ed. 543, 545.

Petitioner contends the Court of Appeals put him in jeopardy twice for the same offense. We have already shown that this contention rests upon a false premise as to the effect of the first opinion and judgment of that court; but if it were true, no failure to observe due process would appear. For due process of law as required by the Fourteenth Amendment does not prevent the State from twice putting an accused in jeopardy for the same offense if under the laws of the State it be determined that errors to the prejudice of the State entered into his former trial and acquittal. It is not offensive to the conscience of mankind, nor contrary to any "principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental," to require that an accused only be discharged after fair and impartial trial in accordance with the law, and not contrary thereto. If the first opinion and judgment of the Court of Appeals amounted to an acquittal of petitioner, as he contends, it is nevertheless true that such acquittal arose out of an error of law in that court holding the indictment charged no crime, and due process was not denied petitioner by the correction of the error while the court had jurisdiction of the case; for claim to fundamental right cannot rest upon the shifting sands of error.

In *Palko v. Connecticut,* 302 U. S. 319, (1, 3), 328, 82 L. ed. 288, (1, 3), 293, 294, this Court held: "A State statute permitting appeals in criminal cases to be taken by the State is not an infringement of the due process provisions of the Fourteenth Amendment . . . A conviction in a State court of murder in the first degree on a second trial of a criminal prosecution after a conviction of murder in the second degree had been set aside on an appeal taken by the State is not in derogation of any privileges or immunities

that belong to the accused as a citizen of the United States, in violation of the Fourteenth Amendment." "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate 'those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?' *Herbert v. Louisiana,* 272 U. S. 312, 71 L. ed. 270. The answer surely must be 'no' . . . The State is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. *State v. Felch,* 92 Vt. 477, 105 A. 23; *State v. Lee,* 65 Conn. 265, 30 A. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202. This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege . . . has now been granted to the State. There is here no seismic innovation. The edifice of justice stands, in its symmetry, to many, greater than before." Giving to the action of the Court of Appeals the construction placed upon it by petitioner, and taking all he says as true, the above case rules this, and adverse to his contentions.

There is some suggestion that the privileges and immunities belonging to petitioner as a citizen of the United States were denied him contrary to the privileges and immunities clause of the Fourteenth Amendment. The same contention was made and rejected in *Palko v. Connecticut* (supra). Said the Court there (p. 329): "There is argument in his behalf that the privileges and immunities clause of the Fourteenth Amendment as well as the due process clause has been flouted by the judgment. *Maxwell v. Dow,* 176 U. S. p. 584, 44 L. ed. 598, gives all the answer that is necessary."

THE INDICTMENT CHARGED A CRIME UNDER THE LAWS OF GEORGIA.

That it may clearly appear no injustice has been done petitioner we will now show that the indictment charged a crime under the laws of Georgia, and that the Court of Appeals did right in correcting its error in first ruling to the contrary. All Code references refer to the Codes of Georgia, and, unless indicated to the contrary, to the Code of 1933.

A Crime Is Charged Under Applicable Common Law Principles.

At the common law the offenses of fraud, cheating, and false pretenses, within the limits set up and defined by the common law, were crimes punishable as misdemeanors. These limits were at first rather restricted, but by the early statute of 33 *Henry VIII c* 1, and the subsequent statutes of 30 *George II c* 24 and 52 *George III c* 64 *sec.* 1, these limits were broadened and the earlier restrictions removed, for the surer prevention of frauds and the more certain punishment of cheats and swindlers. See, 25 *C. J. p.* 584, *Sec.* 1.

In Georgia by the Act of February 25th, 1784 (*Marbury & Crawford's Digest,* 1802, *p.* 404) all laws "in force and binding on the inhabitants of the province on the 14th day of May 1776" not contrary "to the Constitution, laws and form of government now established," were declared "binding on the inhabitants of this State . . . And also the common law of England and such of the statute laws as were usually in force in the said province," and all fines, penalties and forfeitures inflicted or made payable to the crown were "directed to be paid into the public treasury of this State."

The Tenth Division of the Penal Code of 1817 (*Prince's Digest,* 1822, *pp.* 367-369) was entitled "Offences committed by cheats and swindlers, and offences against public trade." This Division contains eleven sections. Various specific acts of fraud described in detail are made crimes, and in addition thereto the following general provisions against fraud

and deceit are laid down: "Sec. II. Any person using any deceitful means (other than those which have been mentioned in this Code) or practices in matters of fraud, shall be deemed a cheat and swindler . . . Sec. VI. Any other deceitful or artful practice, by which individuals or the public are defrauded and cheated, shall be punished . . . Sec. XI. All other offences committed by cheating and deceit, or offences against the public trade, not herein enumerated, but which may occur, or have heretofore been indictable, shall be punished . . ."

In the present Code of 1933, in addition to the specific acts of fraud enumerated in *Part XII, Sec.* 26-7410 provides: "Any person using any deceitful means or artful practice, other than those which are mentioned in Part XII of this Title, by which an individual, or a firm, or a corporation, or the public is defrauded and cheated, shall be punished as for a misdemeanor." This section has appeared in substantially the same language in all the Codes of this State, as follows: Cobb's Digest, p. 822; Code of 1861, Sec. 4463; Code of 1867, Sec. 4507; Code of 1873, Sec. 4596; Code of 1882, Sec. 4895; Code of 1895, Sec. 670; Code of 1910, Sec. 719.

Of this section it has been said: "But *any act,* by which another is 'defrauded and cheated,' under that section, makes the offender a cheat and swindler." *Hampton v. Brown,* 32 Ga. 251, 252.

It has been also said: "In Scots and civil law, the word 'stellionate' is used to denote all such crimes in which fraud is an ingredient as have no special names to distinguish them, and are not defined by any written law. This section may, therefore, be said to be the statute against stellionates." *Foster v. State,* 8 Ga. App. 119, 121.

This section was intended to embrace the three omnibus sections above quoted from the Penal Code of 1817, and in

view of its broad provisions and also in view of the language of Sec. XI of the Code of 1817 retaining as crimes "all other offences committed by cheating and deceit . . . which . . . have heretofore been indictable"; it is clear, first, that all acts of fraud amounting to crimes under the common law and applicable English statutes are retained as crimes, and, second, that the classes of acts recognized by the common law and English statutes to be crimes have been greatly enlarged by this section. "It very greatly enlarges the common law and statutory offences of cheating and swindling by false pretenses or representations . . . Many acts would be criminal under this statute, which would not be criminal under the common law, or under statutes specifically defining the offense of cheating and swindling." *Crawford v. State*, 2 Ga. App. 185, 187. Certain it is, beyond cavil, that any act of fraud which was an offence under the common law is a crime under this section.

As already stated, by the Act of 1784 the common law and applicable English statutes were adopted in this State. This served to make acts which were crimes under the common law, crimes in this State under the statute. It did not retain the common law power of the judges to declare criminal by judicial decision acts they thought wrong, and in that sense it did not retain "common law crimes" in Georgia (*Jenkins* v. *State*, 14 Ga. App. 276, 278); but it did retain as crimes all acts then criminal under the law of England as theretofore laid down and declared by legislative or judicial authority. The adoption of a Penal Code did not abrogate this law. *State v. Jno. Maloney, R. M. Charlton*, 84. Pursuant to this principle, the Code, *Sec. 26-5001*, provides: "Any other offense against public justice, not in this Title provided for, shall be a misdemeanor." This section thus expressly adopts "and makes crimes in this State offenses against public justice . . . which were punishable as such at common law." *Ormond v. Ball*, 120 Ga. 916, 923, 924; *Prichard v. State*, 160 Ga. 527. *Section 26-6501* pro-

vides likewise with respect to offenses against the public peace.

Thus, both under the blanket statute against cheats and under Sec. 26-5001, any fraudulent act which was a crime at the common law is a crime in this State.

We will now proceed to show that the indictment charges a crime at common law.

Common law frauds were divided into two classes, "private cheats" and "public cheats." The offense of "private cheat" was narrow and many frauds were excluded from its operation, it being necessary that a false symbol or token be used in the fraud. The offense of "*public cheat,*" however, was broad and comprehensive. "In public cheats the use of *any fraudulent* device was sufficient to constitute the crime . . . , and it was not necessary that a false symbol or token was made use of. Comprehended within the class of frauds of a *public nature* are frauds affecting the course of justice, cheats by officials, and those immediately injuring the interests of the government or the public, although arising in the course of some particular transaction or contract with private individuals." 25 *C. J. pp.* 586, 587, *Sec.* 3. Among public cheats were "those immediately injuring the interests of the crown . . . the selling of unwholesome provisions and cheats by officials." 12 *Am. & Eng. Enc. p.* 795.

"Cheats which are leveled against public justice, as judicial acts done without authority in the name of another, and frauds which affect the government and the public at large, as rendering false accounts by persons in official positions, writing false news, selling unwholesome provisions, and using false weights and measures, were indictable at common law." *Peo. v. Garnett,* 35 Cal. 470, 95 Am. Dec. 125.

It seems to have always been recognized that any fraud which affected the public was an indictable offense. See, *State v. Middleton,* 23 S. C. L. (Dudley) 276, 279.

The following are some cheats punished as public cheats at the common law, because committed by officials: An overseer of the poor attempted to pocket money collected from the putative father of a bastard, resulting in the "parish being deprived of a fund legally applicable to them (whereby the parish) were defrauded and damnified." *Reg. v. Martin*, 2 Campl. 268, 170 Reprint 1151. An overseer of the poor who refused to account and used fraudulent practices to deceive the poor. *Reg. v. Commings*, 8 Mod. 179, 87 Reprint 594. A justice's clerk failed to pay over a moiety of a fine due the county. *Reg. v. Dale*, 1 Dears. C. C. 37, 169 Reprint 627. Defendants, a captain and purser on a ship, conspired to fabricate false vouchers to cheat the crown, and did so, and were punished as public cheats. In that case said Groce, J.: "That the delivery of such false vouchers, with such fraudulent intent, in pursuance of a conspiracy for that purpose, is an offense in the place where the vouchers were delivered, is a matter which cannot be doubted." *Reg. v. Brisac, et al.*, 8 E. R. C. 138, 4 East 164, 102 Reprint 792.

A superintendent of constabulary was held indictable for rendering false accounts of monies received by him from the constables contrary to his duty to make reports whereby the sums due him and the others might be ascertained. *Reg. v. Baxter*, 5 Cox C. C. 302.

Any fraud which affected the *public revenue* was an indictable cheat at the common law. This principle was recognized in the following cases: The offense charged was a threat to put in motion a prosecution for selling Fryar's Balsam without a tax stamp, defendant obtaining money by the threat. The court quashed the indictment but recognized that had it been so drawn as to charge an attempt to "compound and stifle a public prosecution . . . in *fraud of the revenue*" it would have charged a punishable fraud. *Reg. v. Southerton*, 6 East, 126, 102 Reprint 1235. An apprentice enlisted as a freeman, defrauding the public treasurer of a

bonus, by falsely representing himself as a freeman. This was a fraud on the revenue and hence a crime. *Reg. v. Jones,* 1 Leach C. C. 174, 168 Reprint 189. Bread containing alum was sold to a royal asylum and was held a fraud on the revenue. *Reg. v. Dixon,* 3 M. & S. 11, 105 Reprint 516. "Where two persons were indicted for enabling persons to pass their accounts with the pay office in such a way as to enable them to defraud the government, and it was objected that it was only a private matter of account, and not indictable, the court held otherwise, as it related to the public revenue." *Reg. v. Bambridge,* 12 Am. & Eng. Enc. p. 795, n. 5. A fraud upon a parish by procuring the marriage of a pauper, so as to charge the parish of public money, was an indictable cheat. *Tarrant's Case,* 4 Burrows, 2106.

Closely akin to frauds on the revenue were frauds affecting the government, or any subdivision thereof, the public, or any large number of persons. These frauds were always held to be crimes. "All frauds affecting the crown, and the public at large, are indictable, though arising out of a particular transaction, or contract with the party." *East P. C. p.* 861. Under this principle, the selling of bad bread for prisoners in a hospital was a punishable cheat. *Treeve's Case, East P. C. p.* 821. The selling of unwholesome provisions was thus a public cheat (25 *C. J. p.* 587, *n.* 40); as was vending unwholesome wine (12 *Am. & Eng. Enc. p.* 795, *n.* 4); delivering bread short in weight to the guardians of the poor (2 *Chit. Cr. Law,* 559, 560); dissemination of false news (12 *Am. & Eng. Enc. p.* 795 *at note* 3); and appropriation of gravel and labor, etc. by a surveyor of highways (*Robinson's Case,* 3 *Chit. Cr. Law,* 666). Many frauds affecting the parish were punished as public cheats because committed against the public and governmental authority. *United States v. Watkins,* 28 *Fed. Cases at p.* 427.

A fraud against a municipality is a fraud against the government and against the public. In the following case the charge was "devising and intending to cheat and de-

fraud the city of New York out of its money and property . . . by procuring certain and divers false and fraudulent claims and bills against said city . . . and claims against said city containing false and fraudulent charges" to be allowed and paid. The court said: " . . . the means as set forth are such 'as if executed would amount to a cheat' within the purview . . . of the Code (as) . . . used in its common law significance. 15 *N. Y. S.* 778, 780. Cheat at common law is such a 'fraud as would affect the public . . . or where there was a conspiracy to cheat.' *Peo. v. Babcock,* 7 Johns 201, 5 Am. Dec. 256. . . . Conspiracies to cheat a state or county or city are held indictable as a combination to injure the public. *Cyc., 'Conspiracy,'* 633, citing: *State v. Cordoza,* 11 S. C. 195; *State v. Young,* 37 N. J. L. 184; *McDonald v. Peo.,* 126 Ill. 150, 18 N. E. 817, 9 Am. St. R. 547; *State v. Olson,* 15 N. Y. S. 778." *Peo. v. Miles,* 108 N. Y. S. 510, 518, 519.

The United States Circuit Court for the District of Columbia in 1829 had under consideration the question of common law public cheats, in an indictment against Watkins, fourth auditor of the treasury, and rendered a considered opinion in the matter, in which the English authorities are collected and discussed. Said the court in the third and fourth headnotes: "3. Frauds affecting the public at large, or the public revenue, constitute a distinct class of cases, punishable by indictment; although the fraud be not affected by means of false public tokens, or by forgery, or conspiracy, or by any particular sort of means. 4. The principle which, in transactions between individuals, requires, in order to make the fraud indictable as a public offence, that it should be committed by tokens, or false pretenses, or forgery, or conspiracy, does not apply to direct frauds upon the public. All frauds affecting the public at large, or an indefinite number of persons who have suffered a common or joint damage, by reason of the fraud, are indictable offences at common law." *United States v. Watkins,* 28 Fed. Cases 419, 420, No. 16,649, 3 Cranch C. C. 441.

Any fraud committed by the *device of a conspiracy* was an indictable cheat at the common law. 25 *C. J. p.* 585, *n.* 22b. See 12 *Am. & Eng. Enc. p.* 796, *n.* 3. Holt, C. J. said: "The crime is not the selling one thing for another, but here is a false token, the one pretending to be a broker, and the other a merchant, or *a combination to cheat.*" *Reg. v. MacKarty, et al.,* 6 Mod. 301, 87 Reprint 1040. See the same case at 3 *Ld. Raym.* 325, 92 Reprint, 713, 2 *Ld. Raym.* 1179, 92 Reprint 280. Particularly was any combination to cheat the public a crime. In the following case conviction was sustained of contractors who combined and conspired to defraud the city of Buffalo out of a sum of money by submitting identical bids for work and then dividing the profits realized out of the scheme. The court discusses common law frauds and cheats and says: "These authorities seem to establish that at common law a distinction was made between deceitful acts, which, when committed against the individual amount only to a private fraud and are not indictable, become indictable when embraced in a combination, where the object of the combination is to defraud and cheat the public." *Peo. v. Olson, et al.,* 15 N. Y. S. 778, 780.

From the foregoing authorities it is clear that the acts set out in the indictment charge a punishable fraud and cheat at the common law and therefore under the laws of this State, as (1) a fraud by an official, Thompson being an inspector of the City of Atlanta in the water works department (2) a fraud on the public revenue, by which the public funds of the City were swindled of a portion of the pay the City should have received for its water (3) a fraud affecting the government, the City of Atlanta being a municipal corporation to which a portion of the powers of government have been delegated (4) a fraud affecting the public, because all the inhabitants of the City are affected by such public frauds in loss of funds rightfully owed the City; and (5) a combination and conspiracy to injure and defraud the public and the City, an agency of government.

A Crime Is Charged Under Code, Sec. 26-7410, the Omnibus Statute Against Cheats and Swindlers.

Not only does the indictment charge a crime at common law, but it charges a violation of *Code, Sec.* 26-7410, considered entirely apart from common law principles applicable to public cheats. As has been stated, the section is comprehensive, embraces the three omnibus sections of the Penal Code of 1817, and is the Georgia "statute against stellionates." It is leveled against "*any* deceitful means or artful practice" whereby another is "defrauded and cheated." *It requires but the concurrence of two things to constitute a crime,* first, on the part of the accused, the use of some "deceitful means" or some "artful practice," and second, on the part of another, the result that that other is defrauded by the deceit or artful practices used. *Any addition to these elements to constitute a crime under this section is not only unauthorized by the plain language of the section but is manifestly repugnant thereto.* The section penalizes not only the frauds which had been practiced prior to its enactment, but comprehends likewise every fraud which the ingenuity of the rascal might devise in future, provided only it be accomplished by some "deceitful means or artful practice" resulting in some person or the public being "defrauded or cheated."

It cannot be denied that when Thompson, an inspector of the City employed in the City water department, conspired with a user of city water to tamper with the city meter registering the water so that it would only register a part of the water received by the user, and did so tamper with the meter, that Thompson resorted to the use of deceitful means and an artful practice. When the City was defrauded of water which flowed through the meter and was used by the customer, when had the City known he had used it the City would have included it on his bill, the crime was complete. The tampering with the meter was both a deceitful means and an artful practice. The very act of the

City inspector *conspiring* with the customer of the City to swindle the City of a portion of the water received by the customer was in and of itself a deceitful means and an artful practice. By the scheme used the meter failed to register all the water which flowed through it. Thus causing the meter upon which the City relied to fail to correctly register the water was a deceitful means and an artful practice. As a result of the scheme the City rendered false bills to the conspiring consumers. Causing the City to render the false bills was a deceitful means and an artful practice. The entire scheme and the means used to effectuate it constituted deceitful means and artful practices.

It is not necessary for a defendant to make use of any *particular kind* of deceitful means or artful practice to be guilty. He may make use of "... tokens, signs, or symbols ... (or) by way of concealment of part of the truth as to a fact, or total and misleading silence." *Ricks v. State,* 8 Ga. App. 449 (1).

The case of *Jones v. State,* 97 Ga. 430, is illustrative of the broad scope of the section of the Code under consideration. There the court ruled: "Where the purchaser of goods worth 25 cents delivered to the seller, for the purpose of making payment and receiving correct change, a gold coin worth $20.00, the former ignorantly supposing that the coin was a silver dollar, and the latter, perceiving the mistake, retained the coin and returned only 75 cents in change, he was guilty of being a common cheat and swindler under the provisions of section (26-7410) of the Code." Further said the court: "The artful practice and the deceitful means which he employed consisted in adopting the necessary precautions to keep her in this belief, and thus enable him to obtain the valuable coin and satisfy her with the inadequate sum given back in change. This persuasive silence and equivocal assent to the girl's misstatement that the coin was only a dollar, while a less tangible form of deceitful practice than a more active artifice would have been, were

none the less effectual in the accomplishment of his fraudulent design—perhaps they were the most effectual means he could have employed, because allaying suspicion on the part of the girl was essential to the success of his dishonest purpose. The ingenious cheat and swindler cannot escape punishment because he invents and employs less clumsy means of deceit, and more cunningly pursues his artful practices, than is usually the case with less adept and skillful members of his craft."

We have thus shown that the indictment charged a crime under the common law of public cheats and under Sec. 26-7410 irrespective of common law principles. We will now show a third violation of law is charged.

A Crime Is Charged Under Code, Sec. 112-9901, Against Buying By False Measures.

Code, Sec. 112-9901, provides: "If any person shall knowingly buy or sell by false weights or measures, he shall be deemed a common cheat, and shall be punished as for a misdemeanor."

The indictment charges that the conspiring consumers *bought* from the City by *false measures,* that is, a *water meter so tampered with* that it would not correctly register the water flowing through it. The offense is a misdemeanor. "All who procure, counsel, command, aid or abet the commission of a misdemeanor are regarded by the law as principal offenders, and may be indicted as such. The indictment may be joint against all those connected with the criminal enterprise, or it may be several against any one of them." *Loeb v. State,* 6 Ga. App. 23 (1). The customers being guilty of *buying* water from the City by false measures, Thompson, who aided and abetted them to that end, is likewise guilty.

It is true that in the indictment the words "buying by false measures" are not used. But this is immaterial. The

indictment sets forth the facts in the case in narrative form and all the essentials of the crime of buying by false measures appear from the allegations of fact made. "The offense is characterized in the indictment not by the name given it, but by the *criminal acts* therein alleged to have been committed." *Lummus v. State,* 17 Ga. App. 414 (1); citing: *Camp v. State,* 3 Ga. 417; *O'Halloran v. State,* 31 Ga. 206; *Aiken v. State,* 90 Ga. 452 (1), 454; *Disharoon v. State,* 95 Ga. 351 (1), 356.

"We conclude, therefore, that, as charging the offense of seduction (the crime denominated), the indictment was bad. Its allegations were inadequate to that charge; but it *contains all the substantive facts* constituting a case of adultery and fornication, alleged probably with too minute and unnecessary particularity, but never-the-less so stated that, if proven, a verdict for the latter offense would stand . . . It has often been ruled in this court that an offense is characterized, not by its specific designation in the indictment, but by the criminal acts therein alleged to have been committed." *Disharoon v. State,* 95 Ga. 351, 356.

The Crime Not Larceny.

Considerable argument was made in the Court of Appeals by petitioner that the crime charged was larceny and not that of defrauding the City of Atlanta, the name given in the indictment. The name given the offense is immaterial. Petitioner would be entitled to have his general demurrer sustained upon the ground no crime was charged only if the allegations of fact sustained that contention. We will show, however, that the crime charged was not larceny and that petitioner was correctly indicted and convicted.

If title to the water not registered on the meter passed to the customers it is elementary the crime was not larceny. See, 2 *Bishop's Criminal Law,* 469, *Secs.* 808 (2), 809.

In no event can the offense be larceny, because title to the water passed to the customers when the water went through

the meter, and all the water involved went through the meter. When the water went through the meter it ceased to belong to the City. The meter was installed for that purpose, to measure the amount of water sold. Simply because it did not correctly measure did not mean that a sale did not take place. The validity of the sale did not depend upon the correctness of the measure. Suppose one should walk into a store and take a leg of mutton from the box where it was kept and the merchant should put it on the scales and weigh it and the buyer took it along with him. Would title to the mutton not be in the buyer, but remain in the merchant, because the night before the buyer had gone in the store and tampered with the merchant's scales so as to cheat him, which he had done by reason of changing the scales and later buying the mutton? Of course not. Title to the mutton passed into the buyer, and the correctness of the scales did not constitute the test. The merchant intended to sell the mutton *put on* the scales. The City intended to sell the water *flowing through* the meter.

In a proper *civil action* the storekeeper could reassert title to his mutton, because that title was obtained by fraud. And likewise, the City (except for the *impossibility* thereof) could later reassert title to its water, because that title was obtained by fraud. But that is not the test in a criminal case. For title actually passed. And until it is reasserted, title remains in the purchaser of the mutton and the purchaser of the water. "A vendee who has obtained title to property under a sale induced by fraud *is the owner of the property* until the seller elects to rescind the sale, and a bona fide purchaser, without notice of the fraud, from such a vendee, will acquire a good title." *Mashburn v. Dannenberg,* 117 Ga. 567 (4).

A defendant, who has obtained title by fraud, cannot, when prosecuted for that fraud, set up the very fraud itself as a defense.

The petition for certiorari to the Court of Appeals of Georgia should be denied.

Respectfully submitted,

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